IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE NORPLANT CONTRACEPTIVE PRODUCTS LIABILITY LITIGATION	§ § §	MDL No. 1038

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO COMPLY WITH DISCOVERY ORDER

This Order memorializes oral rulings made by the Court at a hearing held on August 4, 1998, to consider Defendants' Motion to Dismiss With Prejudice For Failure to Comply With Discovery Order (Dkt. No. 615), filed June 24, 1998. At that hearing, the Court made two significant rulings. First, the Court indicated that Defendants' Motion to Dismiss would be GRANTED as to all plaintiffs named in the motion who had answered no discovery requests by August 12, 1998. Second, the Court indicated that Defendants' Motion to Dismiss would be DENIED as to those plaintiffs named in Defendants' motion who had provided partial answers to Defendants' discovery requests by August 12, 1998. Setting a final response date of November 2, 1998, the Court granted this latter category of plaintiffs one further--and final--extension of time to remedy the deficiencies in their discovery responses.

DISCUSSION

In deciding to dismiss the claims of these recalcitrant plaintiffs, the Court notes that a federal court has the inherent power to dismiss an action with prejudice to enforce its orders and to ensure the prompt disposition of lawsuits. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962); *Clofer v. Perego*, 106 F.3d 678, 679 (5th Cir. 1997). The authority to impose this ultimate sanction may also be found in Rule 41 of the Federal Rules of Civil Procedure. Rule 41(b) permits dismissal with prejudice when a party refuses to obey a court order or when a plaintiff's conduct evidences a

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failure to adequately prosecute his lawsuit. *See Dorsey v. Scott Wetzel Services, Inc.*, 84 F.3d 170, 171 (5th Cir. 1996); *Long v. Simmons*, 77 F.3d 878, 879-80 (5th Cir. 1996).[1] Dismissing an action with prejudice for failure to comply with discovery orders or for want of prosecution is appropriate under Rule 41(b) if (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) lesser sanctions would not serve the best interest of justice. *See Dorsey*, 84 F.3d at 171. The presence of one or more of the following "aggravating factors" further justifies dismissal with prejudice: (1) the delay was caused by the plaintiff rather than his counsel, (2) the defendant suffered prejudice as a result of the plaintiff's delay, and (3) the delay was caused by intentional conduct by the plaintiff. *See Morris v. Ocean Sys., Inc.*, 730 F.2d 248, 252 (5th Cir. 1984).

Here, the Court finds there to be a clear record of delay or contumacious conduct on the part of those plaintiffs named in Defendants' dismissal motion who have never complied with any discovery requests or this Court's discovery related orders. In addition to disregarding Defendants' repeated requests for cooperation in the discovery process for more than a year, these Plaintiffs have also ignored several of this Court's orders directing or compelling them to respond to discovery. Many of the orders entered by the Court over the past eighteen months have explicitly warned that failure to comply with Defendants' discovery requests would result in the imposition of appropriate sanctions, including dismissal with prejudice. *See* Dkt. Nos. 461, 490, 494, 509, 510, 540, 597, & 622. In fact, the Court has previously dismissed the claims of various plaintiffs with prejudice for failure to comply with mandated discovery. *See, e.g.*, Dkt. Nos. 490, 509, 630, & 647.

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[1]Rule 41(b) provides in relevant part: "For failure of the plaintiff to prosecute or comply with these rules or any order of the court, a defendant may move for a dismissal of an action or of any claim against the defendant." Although Defendants do not cite Rule 41(b) in their Motion to Dismiss, it is well settled that district courts may invoke that rule sua sponte. *See Martinez v. Johnson*, 104 F.3d 769, 771 (5th Cir. 1997).

In short, despite being given every opportunity to comply with this Court's orders and to furnish Defendants with discovery responses, these recalcitrant Plaintiffs have refused to participate in this litigation for a protracted period of time. In this case, as in a similar case where the Fifth Circuit upheld a Rule 41(b) dismissal with prejudice, we are faced with significant periods of total inactivity, repeated warnings that sanctions would result from continued non-compliance, a failure to obey not one but several court orders, and no adequate excuse or explanation for the lack of compliance. *See Ramsay v. Bailey*, 531 F.2d 706, 709 (5th Cir. 1976). Such circumstances surely establish a clear record of delay or contumacious conduct by Plaintiffs.

The Court similarly finds that lesser sanctions would be unavailing under these circumstances. To begin with, lesser sanctions have already been unsuccessfully attempted in the form of warnings and extensions of time to comply with Defendants' discovery requests. *See Callip v. Harris County Child Welfare Dep't*, 757 F.2d 1513, 1521 (5th Cir. 1985) (holding that providing a plaintiff with a second or third chance following a procedural default is a "lenient sanction," which, when met with further default, may justify dismissal with prejudice); *Porter v. Beaumont Enter. & Journal*, 743 F.2d 269, 272 (5th Cir. 1984) (describing district court's granting of more time to correct a plaintiff's deficient service of process as a "lesser sanction"); *Ramsay*, 531 F.2d at 709 n.2 (holding that where a plaintiff is fully and repeatedly warned that his case will be dismissed with prejudice, it is not necessary for the district court to consider other lesser sanctions).

Additionally, given Plaintiffs' total failure to safeguard their claims or adequately prosecute this case, there is no reason to believe that other lesser sanctions would be anything but futile. Indeed, many of the Plaintiffs have apparently failed to take even the minimal measures of keeping their counsel advised of their current addresses or telephone numbers. "A clear record of delay

coupled with tried *or futile* lesser sanctions will justify Rule 41(b) dismissal with prejudice." *Rogers v. Kroger Co.*, 669 F.2d 317, 322 (5th Cir. 1982) (emphasis added). Granting litigants the benefit of lesser sanctions after they have allowed their claims to languish for over a year despite several binding court orders compelling some action on their part would be tantamount to inviting other litigants to flout the orders of this Court. As the Fifth Circuit has observed: "The most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032-33 (5th Cir. 1990) (citing *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976)).

Having considered the possible efficacy of lesser sanctions in this case and determining that they would be insufficient, the Court finds dismissal with prejudice to be in the best interest of justice. This conclusion is bolstered by the fact that not just one, but arguably all three of the aggravating factors described above are present in this case. For instance, the delay in responding to Defendants' discovery requests is attributable to Plaintiffs rather than their attorneys, Defendants' ability to properly prepare their defenses to these Plaintiffs' claims has clearly been prejudiced, and Plaintiffs' delay appears to be the product of their intentional conduct in electing to not prosecute their claims. Under the totality of these circumstances, the Court concludes that Plaintiffs' claims should be dismissed with prejudice under Rule 41(b) for failure to comply with this Court's prior discovery orders and for want of prosecution. *See Factory Air Conditioning Corp. v. Westside Toyota*, 579 F.2d 334, 338 (5th Cir. 1978) (holding that dismissal of counterclaim with prejudice was proper where the defendant had repeatedly failed to furnish answers to any of the plaintiff's

interrogatories); *see also Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979) (holding that dismissal with prejudice was proper where the plaintiff repeatedly failed to appear for deposition and refused to obey orders to appear).[2]

It is, therefore, ORDERED that the claims of the following Plaintiffs are hereby dismissed with prejudice:

1. the 465 plaintiffs represented by the law firm of Provost & Umphrey who are identified in "Tab A" of Defendants' Præcipe (Dkt. No. 640), filed on August 21, 1998;[3]

2. the 411 plaintiffs represented by the law firm of Parker & Parks who are identified in "Tab B" of Defendants' Præcipe (Dkt. No. 640), filed on August 21, 1998; and

3. the 255 plaintiffs represented by various law firms who are identified in "Tab A" of Defendants' Supplemental Memorandum in Support of Motion to Dismiss (Dkt. No. 657), filed on September 8, 1998.[4]

All other plaintiffs identified in Defendants' Motion to Dismiss who are not covered by this Order

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[2]The Court also notes that under the circumstances of this case, Plaintiffs' claims could alternatively be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 37(b)(2)(C). *See Coane*, 898 F.2d at 1032 n.2 (observing that courts can dismiss an action with prejudice for failure to comply with discovery orders under either Rule 37(b)(2) or Rule 41(b)). Because the standard for granting a dismissal with prejudice under Rule 37(b)(2) is nearly identical to that governing Rule 41(b), the Court finds each of the elements satisfied under that provision as well. *See id.* at 1032-33.

[3]Defendants' Præcipe actually lists 467 Provost & Umphrey plaintiffs, but counsel for those plaintiffs filed a Response to Defendants' Præcipe and Motion to Dismiss on August 26, 1998, indicating that two individuals (i.e., Penny D. Gonzales and Douglas M. Gonzales) were inadvertently included in the Præcipe. Defendants have not contested Plaintiffs' revision of their Præcipe and the Court assumes that they agree with Plaintiffs' counsel on this matter. Therefore, those two plaintiffs are deemed removed from Defendants' Præcipe.

[4]"Tab A" of Defendants' Supplemental Memorandum in Support of Motion to Dismiss actually lists 258 plaintiffs whose claims should be dismissed. However, on September 9, 1998, Defendants filed a Further Supplemental Memorandum in Support of Motion to Dismiss (Dkt. No. 660) indicating that they are no longer seeking dismissal of the following three plaintiffs who are represented by the law firm of Slack & Davis: Lucy Mae Thibodeaux, Cynthia Martins Thomas, and Dawana Sherell Thomas. Hence, those three plaintiffs are not covered by this Order and are deemed removed from "Tab A" of Defendants' Supplemental Memorandum in Support of Motion to Dismiss.

and whose names have not otherwise been withdrawn by Defendants from the Motion to Dismiss, are hereby given until November 2, 1998, to fully comply with the Court's previous discovery orders and Defendants' various discovery requests. This extension of time shall be the last such extension, and a failure by the remaining plaintiffs to abide by the November 2 deadline will result in the dismissal of their claims with prejudice. It is so ORDERED.[5]

SIGNED this the 15th day of September, 1998.

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE

[5]Along with their Motion to Dismiss, Defendants also filed a Motion For Sanctions (Dkt. No. 615). In light of the fact that counsel for Plaintiffs have already provided Defendants with lists of their clients who have not complied with any discovery requests or Orders, and given Defendants' acknowledgment that under such circumstances "Wyeth's conditional request for sanctions is not triggered," Reply Memo. in Supp. of Mot. to Dismiss at 2, the Court hereby DENIES Defendants' Motion for Sanctions as moot.